

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

LAWRENCE ROBINSON,	)	No. CR-F-97-5129 OWN
	)	(No. CV-F-02-5814 OWN)
)	
Petitioner,	)	ORDER DEEMING PETITIONER'S
	)	MOTION TO VACATE JUDGMENT
vs.	)	DENYING PETITIONER'S MOTION
	)	PURSUANT TO 28 U.S.C. § 2255
	)	(Doc. 359) TO BE MOTION
	)	REQUESTING COURT TO
UNITED STATES OF AMERICA,	)	ENTERTAIN RULE 60(b) MOTION
	)	AND GRANTING PETITIONER'S
	)	REQUEST TO ENTERTAIN RULE
Respondent.	)	60(b) MOTION
)	
)	

On February 7, 2007, petitioner Lawrence Robinson, proceeding *in pro per*, filed a motion pursuant to Rule 60(b), Federal Rules of Civil Procedure. By this motion, Petitioner moves to vacate the September 6, 2006 Order denying Petitioner's motion pursuant to 28 U.S.C. § 2255 as time-barred. Petitioner filed a Notice of Appeal with respect to the September 6, 2006 Order, which appeal is pending in the Ninth Circuit.

As explained in *Williams v. Woodfern*, 384 F.3d 567, 586 (9th

1 Cir.2004), *cert. denied*, ___ U.S. ___, 126 S.C. 419 (2005):¹

2 Once Williams filed his notice of appeal of
3 the district court's judgment denying his
4 habeas corpus petition, the district court
5 lost jurisdiction over the petition ... To
6 seek Rule 60(b) relief during the pendency of
7 an appeal, "the proper procedure is to ask
8 the district court whether it wishes to
9 entertain the motion, or grant it, and then
10 move this court, if appropriate, for remand
11 of the case." ... Because Williams did not
12 observe the procedure required to retest the
13 district court with jurisdiction to consider
14 his Rule 60(b) motion, we conclude that the
15 district court's ... order denying the motion
16 is void for lack of jurisdiction.

17 Petitioner's Rule 60(b) motion is therefore deemed to a
18 motion asking this court whether it wishes to entertain the
19 motion to grant it. So deemed, the court GRANTS Petitioner's
20 request to entertain this motion to grant it.

21 Petitioner was convicted by jury trial. He was sentenced on
22 May 11, 1999 pursuant to an Amended Judgment (Doc. 206).

23 Petitioner appealed his conviction and sentence to the Ninth
24 Circuit. On March 31, 2000, the Ninth Circuit affirmed in part,
25 reversed in part, and remanded the matter to the district court.
26 On October 23, 2000, Petitioner was re-sentenced pursuant to the
27 Ninth Circuit remand. Petitioner again appealed to the Ninth
28 Circuit. On June 21, 2001, the Ninth Circuit affirmed and the
29 mandate was issued on July 19, 2001. On October 9, 2001,

30 ¹The rule explained in *Williams* does not apply if the Rule
31 60(b) motion is filed no later than ten days after the judgment is
32 entered. Rule 4(a)(4)(A)(vi), Federal Rules of Appellate
33 Procedure. Here, Petitioner did not file the instant motion within
34 the time period set forth in Rule 4.

1 Petitioner filed a motion for a six-month extension of time to
2 file a Section 2255 motion, which request was granted by Order
3 filed on October 22, 2001. Petitioner filed his Section 2255
4 motion on July 8, 2002.

5 Petitioner correctly contends that the September 6, 2006
6 Order erred in concluding that the one-year limitation period
7 running from "the date on which the judgment of conviction became
8 final" was set to expire on October 2, 2001. In United States v.
9 Calvin, 204 F.3d 1221, 1225 (9th Cir. 2000), the Ninth Circuit
10 ruled that, in those cases in which the Ninth Circuit either
11 partially or wholly reverses a defendant's conviction or
12 sentence, or both, and expressly remands to the district court,
13 the judgment does not become final, and the
14 statute of limitations does not begin to run,
15 until the district court has entered an
amended judgment and the time for appealing
that judgment has passed.

16 Therefore, because Petitioner's Section 2255 motion was filed on
17 July 8, 2002, which was less than one year after the Ninth
18 Circuit affirmed the Amended Judgment entered following the Ninth
19 Circuit's initial remand, Petitioner's Section 2255 motion is not
20 time-barred.

21 Petitioner now must move the Ninth Circuit to remand his
22 appeal based on the ruling herein.

23 ACCORDINGLY, as set forth above:

24 1. Petitioner's motion to vacate judgment pursuant to Rule
25 60(b), Federal Rules of Civil Procedure, is deemed to be a motion
26 requesting the district court to entertain a Rule 60(b) motion to

1 grant it.

2 2. Petitioner must file a motion for remand with the Ninth
3 Circuit.

4 IT IS SO ORDERED.

5 **Dated: February 27, 2007**
6 668554

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE